FOR ARGUMENT



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-454

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INTERNATIONAL TERMINAL OPERATING CO., INC.,
*Petitioner,*

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF FOR THE PETITIONER

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## TABLE OF CONTENTS


| | Page |
|---|---|
| 1. The tests of coverage advanced by the respondents and by the ILA will lead to confusion, uncertainty, and inconsistency in the application of the Act | 1 |
| 2. The longshore industry practice with respect to "point of rest" confirms petitioner's view of the loading/unloading process | 8 |
| 3. To be covered under the Act an employee must be engaged in "maritime employment" at the time of injury | 12 |
| 4. These cases should be decided on their merits and not on the basis of "deference" to the BRB's interpretation of the Act | 13 |
| Conclusion | 15 |

## TABLE OF AUTHORITIES


Cases: Page

*Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962) ..... 7

*Coppolino* v. *I.T.O.*, 1 BRBS 205 (Dec. 2, 1974) ..... 2

*Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974) ..... 11

*Farrell* v. *Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), *rev'd, Maher Terminals, Inc.* v. *Farrell*, —— F.2d ——, 5 BRBS 393, No. 76-1145 (3d Cir. Jan. 17, 1977) ..... 2, 3

*ILA* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, Jan. 10, 1977 (Nos. 76-569 and 76-570) ..... 6

*Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. pending*, Nos. 76-641 and 76-1166 ..... 5

*King* v. *Lavino Shipping Co.*, 5 BRBS 497 (Feb. 25, 1977) ..... 7

*Luker* v. *Ingalls Shipbuilding Co.*, 3 BRBS 321 (Mar. 19, 1976) ..... 3

*Mellado* v. *Universal Terminal & Stevedoring Corp.*, 5 BRBS 493 (Feb. 24, 1977) ..... 3, 7

*O'Hara* v. *Luckenbach S.S. Co.*, 269 U.S. 364 (1926) ..... 11

*Parker* v. *Brown*, 317 U.S. 341 (1943) ..... 11

*Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90 (1937) ..... 12

*Santumo* v. *Sea-Land Service, Inc.*, 3 BRBS 262 (Feb. 27, 1976), *aff'g*, 2 BRBS 209 (ALJ) (Aug. 21, 1975) ..... 3

*Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976) ..... 5, 7

*Stockman* v. *John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976), *petition for cert. pending*, No. 76-571 ..... 3, 14

*Voris* v. *Eikel*, 346 U.S. 328 (1953) ..... 14

TABLE OF AUTHORITIES—continued

Page

Statutes:

44 Stat. 1424, 33 U.S.C. § 902(2) (1970) ..... 13
86 Stat. 1251, 33 U.S.C. § 902(3) (1976) ..... 13
86 Stat. 1251, 33 U.S.C. § 902(4) (1976) ..... 13

Other Authorities:

*House of Representatives Report Number* 1441, 92d Cong., 2d Sess. (1972) ..... 4
*Senate Report Number* 1125, 92d Cong., 2d Sess. (1972) ..... 4, 7, 10
3 Sutherland, *Statutory Construction*, § 60.01 (4th ed. 1973) ..... 14

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### 1. The tests of coverage advanced by the respondents and by the ILA will lead to confusion, uncertainty, and inconsistency in the application of the Act.

The federal respondent has presented two conflicting interpretations of the amended Act.

On the one hand, it says the 1972 amendments include within their coverage all those meeting the situs test who

*physically* handle cargo.[1] There is no explanation for this requirement of physical handling, no citation to the Act or the legislative history, and no reason given for the exclusion of those who are directly involved in the loading and unloading process but who do not happen to handle cargo.[2]

On the other hand, the federal respondent also purports to be fully supporting the interpretation of the Act set forth in the many opinions of the Benefits Review Board (BRB).[3] The BRB has never required physical handling as a prerequisite to coverage. On the contrary, the BRB has virtually read status out of the Act by granting coverage to anyone who is injured and who meets the BRB's liberal situs test. For example, in its view a temporary delivery clerk who slips on ice between a parking lot and the time clock is covered, since part of his job is to process paperwork necessary to the delivery of cargo to truckers.[4] An employee who injures his back while replacing special paper in an IBM machine is covered, since the employee's regular job is as a hiring agent and lead foreman, and a part of his duties involves feeding names of hired employees into IBM machines.[5] Even a pipe fitter supervisor who trips over a T-beam while

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[1] Brief for the Federal Respondent ("Govt. Br.") 20, 25, 25-26, 41.

[2] The federal respondent leaves unclear what test is to be used to determine physical handling, particularly since it also says that actual duties at the time of an accident are irrelevant. Whether it is enough that an employee has at one time handled cargo, or whether he must have spent the greater part of his working career handling cargo, and in any event how all of this is to be proved at a hearing, are all complications which are conveniently passed over without comment.

[3] Govt. Br. 26, 43-44.

[4] *Farrell* v. *Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), *rev'd*, No. 75-1145 (3rd Cir., Jan. 17, 1977).

[5] *Coppolino* v. *I.T.O.*, 1 BRBS 205 (Dec. 2, 1974).

returning to his work shack with his men's signed time cards is covered.[6] The examples could go on and on.[7] When these "status" cases are combined with the BRB's almost limitless view of situs—which would allow coverage, for example, for an accident occurring in a warehouse after cargo had been unloaded and driven across the entire United States[8]—the position of the federal respondent, if it is truly supportive of the BRB, becomes clear. As the Third Circuit recently observed, "* * * it is difficult to conceive of *any* clerical position in maritime employment that would not be covered [under the BRB's reasoning]."[9] The same can be said of any other worker within the broad "maritime" net cast by the BRB and now the federal respondent.

Regardless of which of the two conflicting interpretations the federal respondent is espousing, the keystone

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[6] *Luker* v. *Ingalls Shipbuilding Co.*, 3 BRBS 321 (Mar. 19, 1976).

[7] Because of the facts in the two particular cases before the Court, we have not dealt here with cases outside the longshore aspect of the Amendments. However, it is instructive that in cases outside the longshore area as well, the BRB's reading of the Act has known virtually no bounds. An example is coverage granted in an accident where the employee was participating in a special scuba diving training program sponsored by the employer to qualify the employee as a diver who could inspect the employer's underwater facilities and structures.

[8] *Santumo* v. *Sea-Land Service*, 3 BRBS 262 (Feb. 27, 1976), *aff'g* 2 BRBS 209 (ALJ) (Aug. 21, 1975).

[9] *Maher Terminals, Inc.* v. *Farrell*, No. 75-1145 (3d Cir. Jan. 17, 1977). The coverage test which the BRB has begun to formulate is based on the vague concept of "a claimant's nexus with maritime activity." *Mellado* v. *Universal Terminal & Stevedoring Corp.*, 5 BRBS 493 (Feb. 24, 1977). The First Circuit would cover employees with "bona fide membership in a class of employees whose members would *for the most part* have been covered *some of the time* under the earlier Act * * *." *Stockman* v. *John T. Clark & Son*, 539 F. 2d 264, 277 (1st Cir. 1976) (emphasis added). Abstract formulations such as these, arrived at without reference to industry practice, are sure to create great uncertainty in the Act's coverage.

to the position of all respondents is that unloading is a continuous process from the vessel's hold to the consignee's truck, and all (physical?) work related thereto is covered. This in turn requires the respondents to deal with the Congressional Committees' flat statement that the function of "further trans-shipment," once the cargo has been transported to a storage or holding area, is *not* covered by the Act. The respondents attempt to meet this by treating "trans-shipment" as movement *away from the terminal* by the consignee or his agents.

Unfortunately for the respondents, such an interpretation is impossible, because the exact language used by the Committees was:

> Thus, *employees* whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered * * *.[10]

Even under the respondents' broad view of coverage, it cannot be contended that when Congress referred to "employees" in the context of waterfront employment it had in mind some category of workers other than waterfront employees of waterfront employers. Waterfront employees could never have responsibility for carrying cargo outside the terminal in trucks after the consignee has taken dominion and control over such cargo, and certainly the consignee's truck driver could not be an employee. Therefore, the point the Committees were trying to make would have been totally superfluous and even nonsensical if they were only saying that they did not intend coverage for "employees" who "trans-shipped" outside the terminal. The respondents' crucial interpretation of this unmistakable legislative fiat will thus not stand up, and with its fall goes the whole premise that

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[10] Senate Report No. 1125, 92d Cong., 2d Sess. (1972) ("Senate Committee Report") at 13; H.R. Rep. No. 1447, 92d Cong., 2d Sess. at 11 (emphasis added).

trans-shipment means from within the terminal to outside the terminal.

The *amicus curiae* brief of the International Longshoremen's Association ("ILA") suggests that the Act's coverage should be coextensive with the membership of the ILA's certified collective bargaining units in the Port of New York.[11] The Court below specifically rejected this suggestion:

> Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoremen's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards.[12]

The issue in the cases before this Court is not whether Blundo and Caputo belonged to a longshore union at the time of injury, or whether the work which they were doing was work which members of a longshore union customarily perform in the Port of New York. Rather, the issue is whether they were directly involved in loading or unloading a vessel. To that issue the employee's union label provides no answer.

It adds nothing to an understanding of these cases, therefore, to point out that in the Port of New York some members of the ILA have engaged in work other than the longshore gang's traditional work of taking cargo on or off a vessel. As the ILA states, the New York Shipping Association ("NYSA") has acknowledged in a petition addressed to this Court in a recent case that *members of the ILA* do perform work on the waterfront which does not involve loading or unloading of

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[11] *Amicus curiae* brief for International Longshoremen's Association ("ILA Br.") 15.

[12] Pet. A. 33a; 544 F.2d 35, 52. *See also Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 539 n.17 (5th Cir. 1976), *petitions for cert. pending*, Nos. 76-641, 76-880, and 76-1166; *Sea-Land Service, Inc.* v. *Director*, 540 F.2d 629, 639-40 (3d Cir. 1976).

vessels.[13] It so happens, however, that the facts of the case in which the NYSA petition was filed persuasively demonstrate and support the points made in the petitioner's main brief in this case, namely, (1) that the activity of stuffing and stripping containers is essentially a warehousing function which may be performed either on the pier by ILA labor or miles inland by off-pier consolidators; (2) that the geographical location at which the stuffing or stripping of containers takes place does not depend on anything inherent in the nature of the stuffing or stripping operation; (3) that a great deal of stuffing and stripping of containers in fact takes place off the pier; and (4) that at least in the past, as in the case of Blundo, stuffing and stripping took place on the pier only because the ILA collective bargaining agreement so required. *See* Pet. Br. 41-42, 59-60.

Because of the footloose character of the stuffing and stripping function, the rationale of the court below would have the effect of elevating situs of injury (off-pier or on-pier) to the determinative criterion of coverage in all cases involving stuffing and stripping. Moreover, the disparities to which the arbitrary situs distinction inevitably gives rise would now undoubtedly occur much more frequently as a result of the Second Circuit's recent decision striking down ILA contract provisions which in the past have confined in-port stuffing and stripping of containers to locations actually on a pier.[14] The removal of this restriction will presumably encourage employers to conduct stuffing and stripping operations at more convenient, less congested off-pier locations within ports. This will have

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[13] *ILA* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, Jan. 10, 1977 (Nos. 76-569 and 76-570). The NYSA statement referred to by the ILA addressees "the traditional work *of ILA longshoremen*" and "*ILA's work jurisdiction.*" ILA Br. 5, 6.

[14] *Id.* The restriction required that all stuffing and stripping of consolidated or less-than-trailer-load containers within the fifty mile radius of each port be performed at a pier by ILA labor.

one of two results in terms of the Act: either situs of injury will once again hold sway as the determinant of coverage for large numbers of employees, or the situs test will be abandoned by the courts in order to permit extension of coverage to off-pier locations.[15] Neither result accords with the Act or its legislative history.

The private respondents have posed a hypothetical example which they claim demonstrates an inconsistency inherent in the petitioner's interpretation of the Act. The point of the respondents' hypothetical appears to be that under petitioner's interpretation of the Act there will be differences in coverage between different types of workers performing different functions at the same situs. The petitioner concedes that this is so; indeed the legislative history of the Act expressly contemplates this result.[16] What the Act does not contemplate, and what

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[15] Already the Act's situs requirement has begun to show signs of the strain of accommodating the BRB's expansive definition of employment status. For example, in the recent case of *Mellado* v. *Universal Terminal & Stevedoring Corp., supra,* the Board held that a "terminal laborer" injured while stuffing a container is covered by the Act regardless of the situs of his injury: "[O]nce a claimant's nexus with maritime activity is established his right to benefits under the Act should not be denied * * *."

Thus the certainty of application which is claimed by the federal respondent (Govt. Br. 39 n.7) as a benefit of the Board's expansive view of coverage is in fact an empty promise. Even the Act's situs requirement, which Congress obviously intended to serve as a clearly defined outer boundary of coverage, has now been transformed by the alchemy of the Board's reasoning into part of a vague maritime "nexus" test. The elements of the Board's maritime "nexus" test are extremely unclear, but the test looks very much like a federal mirror-image of the confusing "maritime but local" distinction discarded by this Court fifteen years ago in *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). *See also King* v. *Lavino Shipping Co.*, 5 BRBS 497 (Feb. 25, 1977); *Sea-Land Service, Inc.* v. *Director, supra.*

[16] "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." **Senate Report at 11.**

is directly contrary to the very purpose of the 1972 amendments, is a situation in which there is a disparity in coverage between workers performing the *same* function at the *same* stage in the cargo-handling process. Yet respondents' interpretation of the Act would create just such disparities. Thus, under respondents' theory (1) Caputo is covered but the consignee's truckdriver, who is required to work alongside Caputo loading the truck (A. 37-38), is presumably not covered;[17] (2) Blundo is covered, but another worker at an off-pier warehouse checking the contents of an identical container unloaded from the same vessel is not covered; (3) Blundo and Caputo are covered, but state or local government employees who perform precisely the same terminal operation functions at another facility or port are not covered (thus, incidentally, giving the state or local government a substantial cost advantage over private concerns).

These are the disparities, not the ones in the private respondents' hypothetical, that Congress sought to avoid.

**2. The longshore industry practice with respect to "point of rest" confirms petitioner's view of the loading/unloading process.**

Respondents do not seriously dispute the proposition that in industry practice "point of rest" is a commonly understood term which serves to separate the work of the longshore gang which loads or unloads a vessel (stevedore function) from the work of the warehouse

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[17] Although the respondents appear to believe that the consignee's truck driver is not engaged in "maritime employment" when he picks up cargo from the terminal (*e.g.*, Govt. Br. 19 n.12), they do not explain how they reach this result under their view of coverage. For example, the federal respondent's statement that the Act covers "all physical cargo handling activity anywhere within an area meeting the situs requirements" (Govt. Br. 20) would appear to apply perfectly to the Teamster truck driver picking up or delivering cargo so long as he is in some terminal somewhere.

employee who handles cargo before it is loaded or after it is unloaded (terminal operation function). Indeed, the *amicus curiae* brief of the ILA virtually concedes that "point of rest" is a fact of life in longshore cargo handling.[18]

Yet despite this fact, and despite the clear explanation of point of rest in petitioner's main brief, the federal respondent in its brief has seriously misconstrued the significance of point of rest, treating it in effect as an aspect of *situs*. The result is that most of what the federal respondent has to say about point of rest is not even responsive to the petitioner's position.[19] Thus, the federal respondent's warnings about "shifting" coverage[20] and its reference to "waterfront workers whose daily work carries them from one side of the 'point of rest' to another"[21] betray a complete failure to recognize that "point of rest" helps to *eliminate* "shifting" coverage by defining the loading and unloading process in a functional rather than a geographic sense.[22]

Respondents' second argument with regard to the point of rest concept is that it should not be considered by this Court because the words "point of rest" do not appear in the Act or in the Committee Reports.[23]

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[18] ILA Br. 20 n.8. *See also id.* at 21.

[19] *See* Govt. Br. 30-39.

[20] Govt. Br. 12, 30, 36, 37, 38, 39.

[21] Govt. Br. 37.

[22] A member of a longshore gang engaged in unloading cargo from a vessel to the cargo's point of rest on the pier has the *status* of a covered employee, and he retains that status regardless of whether his physical location is landward or seaward of the point of rest.

[23] Brief for the claimants Blundo and Caputo ("Cl. Br.") 26; Govt. Br. 37-38; ILA Br. 13 n. 7.

The simple answer to this argument is that the Committee Reports describe the point of rest concept when they set forth the "typical" process of unloading a vessel:

> * * * [C]argo, whether in break bulk or containerized form, is typically unloaded from the ship and *immediately transported to a storage or holding area* on the pier, wharf, or terminal adjoining navigable waters.[24]

That Congress spelled out the concept of "point of rest" without using those precise words is hardly a point in respondents' favor, in view of the fact that Congress did not spell out even the *concept* of the all-inclusive coverage test argued for by the respondents, but instead repeatedly used statements in its Reports which specifically contradict respondents' all-inclusive test.

Congress' understanding of the loading/unloading process is crucial because the main issue in this case is the meaning of the terms "loading" and "unloading" as they appear in the Act and the Committee Reports.[25]

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[24] Senate Committee Report at 13 (emphasis added).

Although respondents contend that this reference is no more than an "example" of covered activity, the fact is that Congress was well aware of the nature of the "typical" longshore unloading process (*i.e.*, the process of unloading break bulk or containerized cargo), and that Congress defined that process, as does the petitioner, in terms of the "storage or holding area" to which cargo is "immediately transported" as it leaves the vessel.

[25] *E.g.*:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel * * *.
>
> * * * [C]heckers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

Senate Committee Report at 13.

It is the petitioner's position that the meaning of these terms is apparent from the face of the Committee Reports themselves. But if the Reports were ambiguous, as the federal respondent appears to contend, what better source of clarification would there be than the settled practice and usage of the very industry to which the Act relates?[26] *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 201 (1974); *O'Hara* v. *Luckenbach S.S. Co.*, 269 U.S. 364, 370-71 (1926).[27]

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[26] The federal respondent's search for clarification leads, inexplicably, to the legislative history of a completely different statute—a statute which was held unconstitutional by this Court over fifty years ago. *See* Govt. Br. 27. It is interesting to note, however, that the old legislative history referred to by the federal respondent demonstrates plainly that Congress did *not* consider "moving articles from one point on the dock to another" to be "directly part of the process of loading or unloading a ship * * *." This of course supports petitioner's position that checkers, such as Blundo, who are involved in such terminal operation functions are not "directly involved in the loading or unloading functions."

[27] The ILA has asked the Court not to consider the survey of stevedoring and terminal operation practices which was prepared by the NAS and which is cited, among numerous other authorities, in support of Point I of petitioner's main brief. The information on the longshore industry which is contained in the NAS survey is information of which this Court may properly take judicial notice. *Parker* v. *Brown*, 317 U.S. 341, 363-67 (1943). Although the NAS survey was first presented to the BRB nearly three years ago, and although it has been relied upon and referred to in the course of several administrative and judicial proceedings since that time, neither the Department of Labor nor the ILA has ever presented evidence which contradicts the information contained in the NAS survey. Indeed, in at least one judicial proceeding, before the Fourth Circuit, the NAS survey was relied on by the Department of Labor as well as by NAS. Supplemental Brief of Director, Office of Workers' Compensation Programs at 14-16, filed on rehearing *en banc* in *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080, on rehearing *en banc*, 542 F.2d 903 (4th Cir. 1976), *petitions for cert. pending*, Nos. 76-706 and 76-730.

There can be no serious question as to the reliability of the NAS survey. Much of the information contained therein is derived from collective bargaining agreements to which the ILA is a party and

The third argument raised in opposition to "point of rest" is based on the statement in the Committee Reports which suggests that the 1972 amendments were in part a response to the advent of "modern cargo-handling techniques" such as containerization.[28] As explained in the petitioner's main brief,[29] the point of this statement is not that stuffing and stripping of containers should be covered under the Act, but that all members of the longshore gang actually engaged in loading or unloading a vessel should be covered whether on the vessel or located on the pier as a result of containerization's shift of much of the gang's work to the pier alongside the vessel.[30]

**3. To be covered under the Act an employee must be engaged in "maritime employment" at the time of injury.**

In answer to petitioner's contention that coverage depends on the nature of employment at the time of

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which are public documents on file with the Department of Labor. Moreover, the information which is contained in the survey has been repeatedly confirmed by independent authorities, most recently in a "Task Force Report" of the Office of Workers' Compensation Programs, the federal respondent herein. The relevant portion of the OWCP Task Force Report, entitled "Nature and Character of the Longshore Industry," has been reprinted as Appendix A to the *amicus curiae* brief filed by the NAS in the instant cases.

This Court has itself long ago recognized the basic conclusion regarding industry practice which is conveyed by the information contained in the NAS survey. *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90, 93 (1937) ("stevedoring services * * * always commence in the hold of the vessel and end at the 'first place of rest,' and vice versa."). The petitioner's main brief contains citations to numerous other authorities to the same effect.

[28] *See* Cl. Br. 24; ILA Br. 8.

[29] Pet. Br. 17-19.

[30] In its answering brief the ILA acknowledges that containerization has reduced the necessity for shipboard work among "members of the longshore gangs." ILA Br. 16.

injury, the federal respondent refers to a "long line of cases" [31] which, however, stands only for the familiar proposition that whether an injury arises *in the course of employment* does not depend on the injured worker's activity at the time of injury. The requirement that an injury has been incurred "in the course of employment" is an entirely separate provision of the Act [32] which has nothing to do with the definition of "employee" in Section 902(3). Cases holding that an eligible employee is covered by workmen's compensation while on his way home from work, or while eating lunch, or while picking up his paycheck, do not even address the issue of whether the employee is in fact eligible for benefits in the first place. That is always the thershold issue, and it is the issue in the instance cases.[33]

**4. These cases should be decided on their merits and not on the basis of "deference" to the BRB's interpretation of the Act.**

The answering briefs of both the private and federal respondents contain arguments that this Court should affirm the decision below because of (1) the statutory presumption in 33 U.S.C. § 920(a), or (2) the deference normally due the decisions of administrative agency, or (3) the burden of proof which lies with the employer under the Act.[34] These arguments have already been decisively answered by a number of Court of Appeals

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[31] Govt. Br. 41.

[32] 33 U.S.C. § 902(2).

[33] With respect to these cases, it may be observed that in its definition of "employer," the Act itself contemplates that the "maritime employment" status of an employee may be "in part" as well as "in whole." 33 U.S.C. § 902(4). If, as respondents contend, "maritime employment" were an all-or-nothing proposition, the reference in Section 902(4) to employees who are engaged in "maritime employment" only "in part" would make no sense.

[34] *See* Cl. Br. 11-15; Govt. Br. 43-44.

judges, including the majority below, and even others who may disagree with petitioner's basic position with respect to the Act's coverage.[35] As these judges have pointed out, the "presumption" and "deference" arguments which respondents raise relate to judicial review of *evidentiary* determinations. They have no application where, as here, the controlling facts are undisputed and the issue is solely one of statutory interpretation—an issue peculiarly suited for judicial resolution. Moreover, the principle of judicial deference to administrative agency decisions carries little weight where the agency in question is an "umpiring" or adjudicative body such as the Benefits Review Board, rather than a policy making body invested with special industry expertise.[36]

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[35] *E.g.*, Judges Campbell, Coffin and McEntee, *Stockman* v. *John T. Clark & Son*, *supra*; Judges Friendly and Oakes, the majority below; Judge Lumbard, dissenting below.

[36] Both respondents also argue, citing *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953), that their interpretation of the Act's coverage should be accepted because the Act is a remedial statute which must be liberally construed. What this Court said in *Voris* v. *Eikel*, however, is that the Act "must be liberally construed *in conformance with its purpose*." 346 U.S. at 333 (emphasis added). There is no rule which permits the application of a statute to persons or situations which it was never Congress' purpose to cover. 3 Sutherland, *Statutory Construction* § 60.01 ("The rule of liberal construction will not override other rules where its application would defeat the intention of the legislature or the evident meaning of an act").

## CONCLUSION

For the reasons stated herein and in petitioner's main brief, it is respectfully submitted that the judgment of the court below should be reversed.

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76

444